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Kent A. Russell

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OBLIGATIONS — CONTRACT RESCISSION DUE TO TEMPORARY
DERANGEMENT OF THE INTELLECT

In Louisiana it is essential to the validity of a contract that all parties be legally capable of contracting.¹ Civil Code Article 1789 provides that one is incapable of contracting during a period of temporary derangement of the intellect which arises "from disease, accident, or other cause" when "the situation of the party and his incapacity were apparent."² The courts³ have considered toxemia,⁴ intoxication,⁵ narcotics,⁶ alcoholism,⁷ temporary insanity,⁸ and mental deficiencies arising from physical injuries⁹ as possible temporary incapacitating circumstances. Invalidation does not require evidence that advantage was taken of the temporarily deranged person.¹⁰ That a temporary inca-

Meadors have been set at rest.]" *Id.* at 175. See also *Louisiana Legislation of 1962 — Trusts*, 23 LA. L. REV. 48 (1963). Because the *Harper* suit was brought in 1960, it was not subject to the new legislation.

1. LA. CIVIL CODE art. 1779 (1870).

2. Article 1789 was introduced in the Code in 1825 as Article 1782. There is no comparable article in the French Civil Code. Thus the French jurists have had to rely upon FRENCH CIVIL CODE arts. 1108 and 1123, which are the exact counterparts of LA. CIVIL CODE arts. 1779, 1782 (1870).

3. The jurisprudence discloses that the court, and not the party seeking rescission, has most often identified the incapacity as one of temporary derangement. In *Succession of Schmidt*, 219 La. 675, 688, 53 So. 2d 834, 839 (1951) (habitual insanity alleged, but the court found that the testator's derangement "was by its nature temporary because it arose from disease, and was one which admitted of rational periods"); *Vance v. Ellerbe*, 150 La. 388, 90 So. 735 (1933) (alleged notorious insanity); *Rice v. Key*, 138 La. 483 (1915) (alleged general incapacity); *Keough v. Foreman*, 33 La. Ann. 1434 (1881) (error was alleged).

4. *Succession of Schmidt*, 219 La. 675, 53 So. 2d 834 (1951).

5. *Emerson v. Shirley*, 188 La. 196, 175 So. 909 (1937).

6. *Brumfield v. Paul*, 145 So. 2d 46 (La. App. 4th Cir. 1962).

7. *Rice v. Key*, 138 La. 483, 70 So. 483 (1915); *Keough v. Foreman*, 33 La. Ann. 1434 (1881).

8. *Vance v. Ellerbe*, 150 La. 388, 90 So. 735 (1922).

9. *Smith v. Blum*, 143 So. 2d 419 (La. App. 4th Cir. 1962); *Brooks v. Kendall*, 134 So. 2d 640 (La. App. 2d Cir. 1961).

10. *Smith v. Blum*, 143 So. 2d 419 (La. App. 4th Cir. 1962). But prior cases have suggested there must be evidence of imposition if the temporary derangement was caused by the incapacitated or any person not a party to the contract. "The fact that a man possessed of reason and the power of reflection, is frequently and even daily intoxicated, will not invalidate a contract made by him with a person who is not proved to have taken advantage of a period of intoxication." *Keough v. Foreman*, 33 La. Ann. 1434, 1440 (1881). In *Emerson v. Shirley*, 188 La. 196, 208, 175 So. 909, 913 (1937), the court said: "[W]e take it that the courts will be reluctant to sustain such a plea [of drunkenness] except in cases where the intoxicated party was imposed upon or made a sacrifice by reason of his drunkenness." *Accord*, *Kothmann v. United States Steel*, 64 So. 2d 858 (La. App. 4th Cir. 1953). Where the court finds one of the parties capable of contracting, but not of strong character due to disease, mental retardation, or any other similar cause, it will be overly protective toward that person against imposition, duress, and other fraudulent conduct that would not be treated as such if the parties were on equal basis. *E.g.*, *Nalty v. Nalty*, 222 La. 911, 64 So. 2d 216 (1953); *Baumgarden v. Langles*, 35 La. Ann. 441 (1883); *Chevalier v. Whatley*, 12 La. Ann. 651 (1857).

capacity was voluntary or self-imposed does not prevent rescission by the one who rendered himself incapable.¹¹

There can be no rescission without convincing proof that "at the time of the making of the contract the party was completely bereft of his mental faculties."¹² With the exception of *Emerson v. Shirley*,¹³ every attempt to annul an agreement on the basis of temporary incapacity has failed; in each case the attacking party has been unable to establish the lack of capacity at the time of the making of the agreement.¹⁴ Furthermore, the *Emerson* case,¹⁵ upon reaching the Supreme Court a second time, apparently was decided on the basis of fraud.¹⁶ Thus the jurisprudence may reveal a disinclination on the courts' part to allow attacks based on alleged temporary derangement.

Article 1789, in addition to requiring establishment of temporary incapacity, conditions invalidation on proof that the "situation of the party and his incapacity were apparent." For rescission to be obtained at common law, only proof of actual in-

11. *Emerson v. Shirley*, 188 La. 196, 175 So. 909 (1937). As indicated by the authorities cited *supra* note 10, a showing of imposition may be required if the incapacity is self-imposed.

12. *Emerson v. Shirley*, 188 La. 196, 208, 175 So. 909, 913 (1937). *Accord*, *Kothmann v. United States Steel Products Co.*, 64 So. 2d 858 (La. App. 4th Cir. 1953); *cf.* *Rice v. Key*, 138 La. 483, 70 So. 483 (1915) (evidence of narcotic addiction insufficient to support rescission). See also *Brooks v. Kendall*, 134 So. 2d 640 (La. App. 2d Cir. 1961) (notary's testimony is given greater weight than others present at the time of the making of the contract).

13. 188 La. 196, 175 So. 909 (1937).

14. Insufficient evidence of incapacity was found in the following cases: *Succession of Schmidt*, 219 La. 675, 53 So. 2d 834 (1951); *Rice v. Key*, 138 La. 483, 70 So. 483 (1915); *Keough v. Foreman*, 33 La. Ann. 1434 (1881); *Smith v. Blum*, 143 So. 2d 419 (La. App. 4th Cir. 1961); *Brooks v. Kendall*, 134 So. 2d 640 (La. App. 2d Cir. 1961). In *Vance v. Ellerbe*, 150 La. 388, 90 So. 735 (1922) the annulment attempt failed because of a prescriptive period. *But see* *Metropolitan Life Ins. Co. v. Anderson*, 101 F. Supp. 808 (E.D. La. 1951), where a change of beneficiary was set aside due to incapacity caused by protracted illness, the influence of sedatives, the influence of toxicity caused by malnutrition, and the "cutting off" of the insured's wife; the evidence negated the possibility of a lucid interval. This case was not brought under Louisiana Civil Code Article 1789.

15. 191 La. 741, 186 So. 88 (1938).

16. See *Smith, The Work of the Louisiana Supreme Court for the 1938-1939 Term — Conventional Obligations*, 2 LA. L. REV. 47, 51 (1939): "The opinion does not make clear whether the decision was based on (1) fraud, resulting from the fact that the principal defendant did not give the plaintiff the benefit of information he possessed; or (2) the fact that the defendants took advantage of the plaintiff while he was in an intoxicated condition; or (3) contractual incapacity of the plaintiff resulting from drunkenness. A prior opinion in the case [188 La. 196, 175 So. 909 (1937)] gives support to the view that the real basis of the decision was temporary contractual incapacity caused by intoxication. However, the attention given in the present opinion to the relationship between the parties, coupled with the conflicting character of the testimony on the plaintiff's condition, leads to the belief that the decision was primarily based on fraud and overreaching on the part of the defendants."

capacity is essential;¹⁷ there is no requirement of apparen-¹⁸cy. The common law deviates from its usual penchant for objectivity in the law of contracts in handling incapacity. Louisiana, following the civilian tradition, normally strives for subjectivity in the field of obligations; yet under Article 1789 it is objective to the extent that it will protect the reasonable expectations of a contracting party when the other's incapacity is not apparent.¹⁹ In addition to marking an objective approach, the appar-

17. At common law it is essential to the validity of a contract that the contracting parties possess the mental capacity to appreciate the nature and consequences of their acts. In the Matter of the Estate of Ginsberg, 11 Cal. App. 2d 210, 53 P.2d 397 (1936); *Ellis v. Colorado Nat'l Bank*, 90 Colo. 489, 10 P.2d 336 (1932); *Atlanta & West Point R.R. v. McCord*, 54 Ga. App. 811, 189 S.E. 403 (1936); *Thatcher v. Kramer*, 347 Ill. 601, 180 N.E. 434 (1932); *Hagemeyer v. First Nat'l Bank & Trust*, 306 Ky. 774, 209 S.W.2d 320 (1948); *Shotwell v. First Nat'l Bank*, 127 Neb. 676, 256 N.W. 508 (1934); *Price's Ex'r v. Barham*, 147 Va. 478, 137 S.E. 511 (1927). From the variety of incapacitating derangements considered by the courts it would seem there is no restriction on the types of factors that could cause the derangement. See generally 17 C.J.S. *Contracts* § 133 (1963). There must be proof that the incapacity existed at the time of the making of the agreement. *Richard v. Smith*, 361 S.W.2d 741 (Ark. 1962); *Donaldson v. Johnson*, 359 S.W.2d 810 (Ark. 1962); *Boerema v. Johnson*, 357 Mich. 433, 98 N.W.2d 596 (1959); *Price's Ex'r v. Barham*, 147 Va. 478, 137 S.E. 511 (1927). See *Mills v. Shepard*, 159 Kan. 668, 157 P.2d 533 (1945); *Hagemeyer v. First Nat'l Bank & Trust*, 306 Ky. 774, 209 S.W.2d 320 (1948). The burden of clear and cogent proof of the actual incapacity to comprehend the nature and consequences of the agreement falls on the attacker in the absence of a reasonable inference of fraud or duress by the other party. *But cf. Harral v. Helton*, 230 Ark. 913, 327 S.W.2d 549 (1959). At law the contracts of one who is incapable are avoided on the ground of incompetency, while in equity they are avoided on the ground of fraud. For one to rescind on the basis of fraud he must usually show that the other party took advantage of his infirmity and a presumption of fraud will arise where such imposition is manifest. See *Burch v. Scott*, 168 N.C. 602, 84 S.E. 1035 (1915). See note 11 *supra* for the Louisiana view.

18. *E.g.*, *Brewster v. Weston*, 235 Mass. 14, 126 N.E. 271 (1920): "[A]s a contract made by an insane person is voidable, it is not affected by the circumstance that the other party acted fairly and without knowledge of the want of mental capacity or of circumstances which ought to have put him of inquiry, because he who deals with one who is insane or with an infant does so at his peril." *Id.* at 16, 126 N.E. at 271. In *Joiner v. Southern Land Sales Corp.*, 158 Ga. 752, 124 S.E. 518 (1924) it was said: "[T]he deed of an insane person, though made without fraud and for adequate consideration, may be avoided by his heirs, not only as against his immediate grantee but also as against bona fide purchasers for value and without notice of such insanity. 'The fairness of the defendant's conduct cannot supply the plaintiff's want of capacity.'" *Id.* at 753, 124 S.E. at 518. See *e.g.*, *Neale v. Sterling*, 117 Cal. App. 507, 4 P.2d 250 (1931); *Warren v. Federal Land Bank*, 157 Ga. 465, 122 S.E. 40 (1923); *Orr v. Equitable Mortgage Co.*, 107 Ga. 499, 33 S.E. 708 (1899); *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705 (1866); *Gingrich v. Rodgers*, 69 Neb. 527, 96 N.W. 156 (1903); *Dewey v. Allgire*, 37 Neb. 6, 55 N.W. 276 (1893). There are, however, some jurisdictions that would require that the ignorant purchaser or other party to the contract be placed in statu quo if he gave sufficient consideration and took no advantage of the other party for there to be rescission. *E.g.*, *Smartwood v. Chance*, 131 Iowa 714, 109 N.W. 297 (1906); *Cash v. Bank of Lowes*, 196 Ky. 570, 245 S.W. 137 (1922); *Hillsdale Nat'l Bank v. Sansone*, 8 N.J. Super. 497, 78 A.2d 441 (1950).

19. Compare FRENCH CIVIL CODE art. 503, which apparently requires interdiction prior to the perfection of the contract, or subsequent interdiction plus

ency requirement with its more stringent burden of proof also tends to prevent counterfeit attacks on valid agreements.

The requirement of apparençy in Article 1789 is susceptible of two interpretations: either it is necessary for the co-contractant to have actual knowledge of the incapacity, or it suffices for the incapacity to be notorious — known generally in the community — regardless of the other's lack of actual knowledge. The Louisiana Civil Code recognizes two types of mental incapacity — insanity²⁰ and temporary derangement.²¹ Article 1788 provides that a contract made by a person of insane mind is void for want of consent. There is no ambiguity in its apparençy requirements; it expressly provides that, in addition to proving the existence of the incapacity at the time of perfection of the agreement,²² one seeking rescission must prove either the incompetent was known by those who generally saw and conversed with him to be of unsound mind, *or* the other contracting party actually knew of his incapacity.²³ Interdiction prior to contracting is conclusive proof of both requirements.²⁴

In temporary derangement situations the courts generally

proof of notoriety at the time of perfection: "Acts performed previously to the interdiction can be annulled, if it is notorious that the cause of (the) interdiction existed at the time such acts were performed." The commentators are silent when dealing with temporary derangement of the intellect other than to say that where one is incapable to contract there can be no engagement, although it would seem that only the incapacity itself need be proved. See 4 AUBRY ET RAU, COURS DE DROIT CIVIL FRANCAIS n° 343, at 477 (5th ed. 1902): "The consent necessary for the formation of an agreement supposes at the same time, on the part of him who gives it, both the intention to oblige himself and a sufficient intellectual development to evaluate the consequences which his compliance must entail. An agreement contracted, either with a person who has agreed to it only in jest or with a child still lacking understanding, is to be considered as not having been made. In pure theory, it ought to be the same for the agreement made with an individual who was insane or in a state of complete intoxication. But our present law, in accord with the doctrine of our old writers, generally sees in the permanent obliteration of intellectual faculties only a lack of capacity or a simple vice of consent, which does not prevent the actual formation of the contract, and which creating only an obstacle to its validity, only gives rise to an action of nullity, available exclusively for the benefit of the incapable person." See also 2 OEUVRES DE POTHIER, TRAITÉ DES OBLIGATIONS n° 49, at 28 (Bugnet ed. 1861); 8 BEUDANT, COURS DE DROIT CIVIL FRANCAIS n° 96 (2d ed. 1936); 4 MARCADÉ, EXPLICATION THÉORIQUE ET PRATIQUE DU CODE NAPOLEÓN n° 397, at art. 1108, nIII (1859); 6 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS nos 76, 172, 173 (1930); 3 TOULLIER, LE DROIT CIVIL FRANCAIS n° 122 (1930). See generally, 1 CHARTON, TRAITÉ DU DOL ET DE LA FRAUD n° 88 (1838); 6 DURANTON, COURS DE DROIT FRANCAIS n° 103 (3d ed. 1834); 1 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 271-273 (12th ed. 1935).

20. LA. CIVIL CODE art. 1788 (1870).

21. *Id.* art. 1789.

22. *Id.* art. 1788(2).

23. *Id.* art. 1788(3).

24. *Id.* art. 1788. If the incompetent was not interdicted when the contract was confected, the attacker must petition for interdiction prior to institution of a suit for rescission. *Id.* art. 1788(4).

have held that the apparenacy requirement of Article 1789 is the same as that of the insanity article — the attacking party must prove *either* the temporary derangement was notorious *or* the other contracting party knew of the infirmity.²⁵ This, of course, is consistent with the rules relating to insanity. However, a recent court of appeal case contains language indicating the temporary derangement provision requires proof of the co-contractant's actual knowledge of the incapacity at the time the contract was confected.²⁶

The propriety of this restriction is questionable. The solution lies in balancing the social desirability of protecting either the incapable person or the good faith co-contractant. Permitting rescission when temporary derangement is either notorious or actually known provides an equitable balance which to a degree protects the legitimate interests of both parties. The one suffering the temporary derangement is protected if his condition is generally known regardless of the other party's lack of actual knowledge; otherwise the reasonable expectations of the unsuspecting co-contractant are protected. The requirement of notoriety also provides an effective shield against fabricated attacks on the validity of agreements. In addition, the alternative apparenacy requirements — notoriety or actual knowledge — would be congruous with those under the insanity article. Situations may also arise in which there is neither notoriety nor actual knowledge of the temporary derangement, but in which the incapacity was so apparent the other party should have known of it. It is submitted that the court should consider such apparenacy as actual knowledge. Thus an integral interpretation of Article 1789 requires that rescission be allowed on grounds of temporary derangement if it can be established that the incapacity existed at the time of contracting and that either the condition was notorious, or the co-contractant knew or should have known of it.

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25. *Vance v. Ellerbe*, 150 La. 388, 90 So. 735 (1922). After a discussion of Articles 1788 (insanity) and 1789 (temporary derangement) the court said: "From these provisions of the law, it is apparent that one who attacks the acts of a person of unsound mind, but not interdicted according to the forms provided by the Civil Code, bears the burden of proving his incapacity, and that it was either generally known, or that the person contracted with him knew it." *Id.* at 397, 90 So. at 738. *Accord*, *Smith v. Blum*, 143 So.2d 419, 422 (La. App. 4th Cir. 1962).

26. *Brumfield v. Paul*, 145 So.2d 46 (La. App. 4th Cir. 1962).